

In The Matter Of:

Apache Nitrogen Products, Inc.,

Respondent .

U.S. EPA
Docket No. 95-07

Proceeding Under Section 106(a) of the
Comprehensive Environmental Response,
Compensation, and Liability Act of 1980,
as amended, 42 U.S.C. § 9606(a), and
Under Section 7003 of the Resource
Conservation and Recovery Act of 1976,
as amended, 42 U.S.C. § 6973

ADMINISTRATIVE ORDER
FOR REMEDIAL DESIGN, REMEDIAL ACTION AND OTHER RESPONSE ACTIONS

TABLE OF CONTENTS

I.	INTRODUCTION AND JURISDICTION.....	3
II.	FINDINGS OF FACT.....	4
III.	CONCLUSIONS OF LAW AND DETERMINATIONS.....	6
IV.	NOTICE TO THE STATE.....	7
V.	ORDER.....	8
VI.	DEFINITIONS.....	8
VII.	NOTICE OF INTENT TO COMPLY.....	10
VIII.	PARTIES BOUND.....	11
IX.	WORK TO BE PERFORMED.....	12
X.	ENDANGERMENT AND EMERGENCY RESPONSE.....	16
XI.	COMPLIANCE WITH APPLICABLE LAWS.....	16
XII.	PROJECT MANAGER.....	17
XIII.	SITE ACCESS AND DATA/DOCUMENT AVAILABILITY.....	18
XIV.	RECORD PRESERVATION.....	21
XV.	DELAY IN PERFORMANCE.....	22
XVI.	ASSURANCE OF ABILITY TO COMPLETE WORK.....	23
XVII.	UNITED STATES NOT LIABLE.....	24
XVIII.	ENFORCEMENT AND RESERVATIONS.....	25
XIX.	EFFECTIVE DATE AND COMPUTATION OF TIME.....	27
XX.	OPPORTUNITY TO CONFER.....	27

1 ADMINISTRATIVE ORDER
2 FOR REMEDIAL DESIGN, REMEDIAL ACTION AND OTHER RESPONSE ACTIONS
3

4 I. INTRODUCTION AND JURISDICTION

5 This Administrative Order (the "Order") directs Apache
6 Nitrogen Products, Inc. ("Respondent") to perform remedial
7 design, remedial action and other response actions for the remedy
8 selected and described in the Record of Decision ("ROD") for the
9 Apache Powder Superfund Site ("the Site"), dated September 30,
10 1994. The ROD is attached to this Order as Appendix 1 and is
11 incorporated herein by reference. Work required under this Order
12 is further defined in Section IX (Work To Be Performed) and in
13 the Scope of Work ("SOW") attached hereto as Appendix 2. This
14 Order is issued to Respondent by the United States Environmental
15 Protection Agency ("EPA") under the authority vested in the
16 President of the United States by Section 106(a) of the
17 Comprehensive Environmental Response, Compensation, and Liability
18 Act of 1980, as amended ("CERCLA"), 42 U.S.C. § 9606(a). This
19 authority was delegated to the Administrator of EPA on January
20 23, 1987, by Executive Order 12580 (52 Fed. Reg. 2926, January
21 29, 1987), and was further delegated to EPA Regional
22 Administrators on May 11, 1994 by EPA Delegation No. 14-14-B.
23 This Order is also issued under the authority of
24 Section 7003 of the Resource Conservation and Recovery Act, as
25 amended ("RCRA"), 42 U.S.C. § 6973. This authority was delegated
26 to EPA Regional Administrators on March 20, 1985, by EPA
27 Delegation No. 8-22-B.
28

1
2
3 II. FINDINGS OF FACT

4 A. The Apache Powder Superfund Site is located in Cochise
5 County, Arizona, approximately fifty miles southeast of Tucson.
6 The Site includes contaminated soils on Respondent's property and
7 contaminated groundwater and surface water beneath the property
8 and beyond the property boundaries. The Site is bordered on the
9 east by the San Pedro River, and on the north and west by
10 inhabited ranchlands. The ROD contains a more detailed
11 description of the Site.

12 B. Respondent conducts ongoing manufacturing operations on
13 its property, including the manufacture of nitric acid, solid and
14 liquid ammonium nitrate, and nitrogenous fertilizer solutions.
15 Historically, operations wastewater was discharged into dry
16 washes that flowed into the San Pedro River. More recently,
17 operations wastewater has been discharged into unlined
18 evaporation ponds on Respondent's property.

19 C. Respondent is the current owner of the Site, and
20 Respondent or its predecessor in interest has been the owner of
21 the Site since the 1920's. Respondent or its predecessor in
22 interest generated and disposed of the waste that has
23 contaminated the Site soils and area groundwater.

24 D. A shallow groundwater aquifer underlies the Site. The
25 present horizontal groundwater flow is towards the northwest.
26 The aquifer downgradient of the Site is used as a drinking water
27 source by area residents. Since 1989, Respondent has been
28

1 supplying certain residents with bottled water. Respondent has
2 begun to provide certain residents with permanent deep-aquifer
3 drinking water wells.

4 E. The Site was included on the EPA National Priority List
5 in 1990, pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605.

6 F. The contamination present at the Site exists in the Site
7 soils and area groundwater. The perched groundwater beneath the
8 facility is contaminated with nitrate, arsenic and fluoride. The
9 shallow aquifer is contaminated with nitrate. Site soils contain
10 a variety of contaminants, including antimony, arsenic, barium,
11 chromium, nitrate and vanadium pentoxide. The principal threats
12 at the Site include the ingestion by infants of the nitrate-
13 contaminated groundwater, and exposure to and/or ingestion of the
14 contaminated Site soils. The ROD contains a more detailed
15 description of Site contamination and the risks posed by that
16 contamination.

17 G. On October 5, 1989, EPA issued to Respondent Unilateral
18 Administrative Order No. 90-04 for Partial Remedial Investigation
19 and Response Actions, requiring a remedial investigation ("RI")
20 and feasibility study ("FS").

21 H. EPA revised Respondent's RI and FS reports in 1994 to
22 include, among other things, additional feasibility study work.
23 EPA reevaluated remedial alternatives and in June 1994 issued a
24 proposed plan identifying preferred remedies for the
25 contamination: extraction and constructed wetlands treatment for
26 the shallow aquifer, extraction and treatment through a brine
27 concentrator for the perched groundwater, and a variety of

1 remedies for the soils. The public was provided an opportunity
2 to comment on the proposed remedies.

3 I. EPA's decision selecting soil and groundwater remedies
4 is embodied in the ROD executed on September 30, 1994, upon which
5 the State of Arizona had a reasonable opportunity to review and
6 comment. The ROD is supported by an administrative record that
7 contains the documents and information upon which EPA based the
8 selection of the remedy. The administrative record was made
9 available to the public at the time of the issuance of the
10 proposed plan in June 1994.

11 J. EPA and the State of Arizona have undertaken other
12 response actions at the Site. These actions have included
13 conducting a preliminary investigation, overseeing Respondent's
14 RI/FS activities, overseeing Respondent's alternative drinking
15 water activities, and overseeing ongoing groundwater monitoring.

16
17 III. CONCLUSIONS OF LAW AND DETERMINATIONS

18 A. The Apache Powder Site and any other area where
19 hazardous substances have come to be located is a "facility" as
20 defined in Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

21 B. Respondent is a "person" as defined in Section 101(21)
22 of CERCLA, 42 U.S.C. § 9601(21), and as defined in Section
23 1004(15) of RCRA, 42 U.S.C. § 6903(15).

24 C. Respondent is a "liable party" as defined in Section
25 107(a) of CERCLA, 42 U.S.C. § 9607(a), and is subject to this
26 Order under Section 106(a) of CERCLA, 42 U.S.C. § 9606(a).

27 D. Respondent is the current owner and operator of the
28

1 Apache Powder Site, and Respondent has disposed of solid wastes
2 or hazardous wastes at the Site.

3 E. The substances found at the Site are "hazardous
4 substances" as defined in Section 101(14) of CERCLA, 42 U.S.C.
5 § 9601(14), or are "solid wastes" or "hazardous wastes" as
6 defined in Sections 1004(27) and 1004(5) of RCRA, 42 U.S.C. §§
7 6903(27) and 6903(5).

8 F. The past disposal of hazardous substances at the Site
9 constitute "releases" as defined in Section 101(22) of CERCLA, 42
10 U.S.C. § 9601(22), and the past disposal practices at the Site
11 constitute "disposal" of solid wastes or hazardous wastes as
12 defined in Section 1004(3) of RCRA, 42 U.S.C. § 6903(3).

13 G. The potential for future migration of hazardous
14 substances from the Site poses a threat of a "release" as defined
15 in Section 101(22) of CERCLA, 42 U.S.C. § 9601(22).

16 H. The release, threat of release or disposal of one or
17 more solid wastes or hazardous wastes or hazardous substances
18 from the facility may present an imminent and substantial
19 endangerment to the public health or welfare or the environment.

20 I. The actions required by this Order are necessary to
21 protect the public health, welfare or the environment.

22 23 IV. NOTICE TO THE STATE

24 On December 14, 1994, prior to issuing this Order, EPA
25 notified the State of Arizona, Department of Environmental
26 Quality, that EPA would be issuing this Order.

1
2 V. ORDER

3 Based on the foregoing, Respondent is hereby ordered to
4 comply with the following provisions, including but not limited
5 to all attachments to this Order, all documents incorporated by
6 reference into this Order, and all schedules and deadlines
7 contained in this Order, attached to this Order, or incorporated
8 by reference into this Order.
9

10 VI. DEFINITIONS

11 Unless otherwise expressly provided herein, terms used in
12 this Order that are defined in CERCLA or in regulations
13 promulgated under CERCLA shall have the meaning assigned to them
14 in the statute or its implementing regulations. Whenever terms
15 listed below are used in this Order or in the documents attached
16 to this Order or incorporated by reference into this Order, the
17 following definitions shall apply:

18 "CERCLA" shall mean the Comprehensive Environmental
19 Response, Compensation, and Liability Act of 1980, as amended, 42
20 U.S.C. §§ 9601 et seq.

21 "Day" shall mean a working day, which shall mean a day other
22 than a Saturday, Sunday, or Federal holiday. In computing any
23 period of time under this Order, when the last day would fall on
24 a day that is not a working day, the period shall run until the
25 end of the next working day.

26 "EPA" shall mean the United States Environmental Protection
27 Agency.
28

1 "National Contingency Plan" or "NCP" shall mean the National
2 Oil and Hazardous Substances Contingency Plan promulgated
3 pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, and codified
4 at 40 C.F.R. Part 300, including any amendments thereto.

5 "RCRA" shall mean the Resource Conservation and Recovery
6 Act, as amended, 42 U.S.C. §§ 6901 et seq.

7 "Record of Decision" or "ROD" shall mean the EPA Record of
8 Decision relating to soils and groundwater contamination at the
9 Apache Powder Site, signed on September 30, 1994, by the Deputy
10 Regional Administrator, EPA Region IX, and all attachments
11 thereto.

12 "Remedial Action" or "RA" shall mean those activities to be
13 undertaken to implement the remedies set forth in the ROD
14 pursuant to the Scope of Work and this Order.

15 "Remedial Design" or "RD" shall mean those activities to be
16 undertaken to develop the final plans and specifications for the
17 Remedial Action pursuant to the Scope of Work and this Order.

18 "Section" shall mean a portion of this Order identified by a
19 roman numeral, and includes one or more paragraphs identified by
20 capital letter.

21 "Site" or "Apache Powder Superfund Site" shall mean the
22 approximately 1,000 acres of property owned by Respondent near
23 St. David, Arizona, and all areas where hazardous substances or
24 solid wastes or hazardous wastes were disposed or have come to be
25 located.

26 "SOW" shall mean the Scope of Work for Remedial Design,
27 Remedial Action and other response actions at the Site, as set

1 forth in Appendix 2 to this Order, and any modifications made to
2 the SOW under this Order.

3 "State" shall mean the State of Arizona.

4 "United States" shall mean the United States of America.

5 "Work" shall mean all activities Respondent is required to
6 perform under this Order and the SOW attached hereto, including
7 Remedial Design, Remedial Action, other response actions and any
8 activities required to be undertaken pursuant to Sections IX
9 (Work To Be Performed) through XVIII (Enforcement and
10 Reservations) of this Order.

11 "Work Plan(s)" shall mean work plan(s) developed by
12 Respondent and approved by EPA which details work to be conducted
13 pursuant to the SOW and this Order.

14
15 VII. NOTICE OF INTENT TO COMPLY

16 Not later than January 6, 1995, Respondent shall provide
17 written notice to EPA's manager of the Apache Powder project
18 (EPA's "Project Manager") stating whether or not Respondent will
19 comply with the terms of this Order. If Respondent does not
20 unequivocally commit to perform the requirements of this Order,
21 Respondent shall be deemed to have violated this Order and to
22 have failed or refused to comply with this Order. Respondent's
23 written notice shall describe, using facts that exist on or prior
24 to the effective date of this Order, any "sufficient cause"
25 defenses asserted by Respondent under Sections 106(b) and
26 107(c)(3) of CERCLA, 42 U.S.C. §§ 9606(b) and 9607(c)(3). The
27 absence of a response by EPA to the notice required by this

1 paragraph shall not be deemed to be acceptance of Respondent's
2 assertions.

3
4 VIII. PARTIES BOUND

5 A. This Order shall apply to and be binding upon
6 Respondent, its directors, officers, employees, agents,
7 successors, and assigns. Respondent is solely responsible for
8 carrying out all activities required by this Order. No change in
9 the ownership, corporate status, or other control of Respondent
10 shall alter any of the Respondent's responsibilities under this
11 Order.

12 B. Respondent shall provide a copy of this Order to any
13 prospective owner or successor before a controlling interest in
14 Respondent's assets, property rights, or stock are transferred to
15 the prospective owner or successor. Respondent shall provide a
16 copy of this Order to each contractor, sub-contractor,
17 laboratory, or consultant retained to perform any Work under this
18 Order, within five (5) days after the effective date of this
19 Order or on the date such services are retained, whichever date
20 occurs later. Respondent shall also provide a copy of this Order
21 to each person representing any Respondent with respect to the
22 Site or the Work and shall condition all contracts and
23 subcontracts entered into hereunder upon performance of the Work
24 in conformity with the terms of this Order. With regard to the
25 activities undertaken pursuant to this Order, each contractor and
26 subcontractor shall be deemed to be related by contract to the
27 Respondent within the meaning of Section 107(b)(3) of CERCLA, 42

1 U.S.C. § 9607(b)(3). Notwithstanding the terms of any contract,
2 Respondent is responsible for compliance with this Order and for
3 ensuring that its contractors, subcontractors and agents comply
4 with this Order, and perform any Work in accordance with this
5 Order.

6
7 IX. WORK TO BE PERFORMED

8 A. General Obligations

9 1. Respondent shall continue to implement the Alternate
10 Domestic Water Supply Plan approved by EPA by letter dated March
11 17, 1994.

12 2. Respondent shall cooperate with EPA in providing infor-
13 mation regarding the Work to the public. As requested by EPA,
14 Respondent shall participate in the preparation of such informa-
15 tion for distribution to the public and in public meetings which
16 may be held or sponsored by EPA to explain activities at or
17 relating to the Site.

18 3. a. Respondent shall appoint a representative ("Project
19 Coordinator") designated by it to act on its behalf to coordinate
20 the Work. By January 13, 1995, Respondent shall notify EPA in
21 writing of the name and qualifications of the Project
22 Coordinator, including the support entities and staff, proposed
23 to be used in carrying out Work under this Order. If at any time
24 Respondent proposes to use a different Project Coordinator,
25 Respondent shall notify EPA and shall obtain approval from EPA
26 before the new Project Coordinator performs any Work under this
27 Order.

1 b. EPA will review Respondent's selection of a Project
2 Coordinator according to the terms of this paragraph. If EPA
3 disapproves of the selection of the Project Coordinator,
4 Respondent shall submit to EPA within twenty (20) days after
5 receipt of EPA's disapproval of the Project Coordinator
6 previously selected, a list of Project Coordinators, including
7 primary support entities and staff, that would be acceptable to
8 Respondent. EPA will thereafter provide notice to Respondent of
9 the names of the Project Coordinators that are acceptable to EPA.
10 Respondent may then select any approved Project Coordinator from
11 that list and shall notify EPA of the name of the Project
12 Coordinator selected within fifteen (15) days of EPA's notice of
13 acceptable Project Coordinators.

14 4. Respondent shall submit all reports (daily, weekly,
15 monthly, etc.) prepared by its contractors and subcontractors in
16 accordance with the SOW to EPA's designated Project Manager or
17 other persons EPA may select.

18 B. Submission of Work Plans and Other Documents

19 1. Documents to be Submitted by Respondent: In accordance
20 with the SOW attached as Appendix 2 to this Order, Respondent
21 shall submit Work Plans and other documents to EPA for the design
22 and implementation of the Remedial Action at the Site and for
23 other response actions, including groundwater monitoring. Upon
24 approval by EPA, all Work Plans submitted by the Respondent
25 pursuant to the SOW shall be incorporated into and become
26 enforceable under this Order. Upon approval by EPA of the
27 required Work Plans, Respondent shall implement the Work Plans in

1 accordance with the schedule approved by EPA. Respondent shall
2 submit all plans, submittals and other deliverables required
3 under the approved Work Plans in accordance with the approved
4 schedule for review and approval pursuant to the SOW. The
5 schedules contained in the SOW and any reissued schedules shall
6 be incorporated into and become enforceable under this Order.
7 Unless otherwise directed by EPA, Respondent shall not commence
8 any Remedial Design or Remedial Action activities or any other
9 response actions at the Site prior to approval by EPA.

10 2. Upon three (3) days advance notice by EPA, by telephone
11 or in writing, to the Project Coordinator for Respondent, the
12 Project Coordinator shall attend a scoping meeting at a time and
13 place determined by EPA, to discuss issues relating to the
14 contents of any deliverable, plan, report, or other item which is
15 required to be submitted for review and approval pursuant to this
16 Order, or relating to Work to be performed by Respondent pursuant
17 to this Order.

18 3. After review of any deliverable, plan, report, or other
19 item which is required to be submitted for review and approval
20 pursuant to this Order, EPA may: (a) approve the submission; (b)
21 approve the submission with modifications; (c) disapprove the
22 submission and direct Respondent to re-submit the document after
23 incorporating EPA's comments; or (d) disapprove the submission
24 and assume responsibility for performing all or any part of the
25 response action. As used in this Order, the terms "approval by
26 EPA", "EPA approval" or a similar term mean the action described
27 in subparagraphs (a) or (b) of this paragraph.

1 4. In the event of approval or approval with modifications
2 by EPA, Respondent shall proceed to take any action required by
3 the deliverable, plan, report, or other item, as approved or
4 modified by EPA.

5 5. Upon receipt of a notice of disapproval with direction
6 for resubmission, Respondent shall, within the time prescribed by
7 EPA, correct the deficiencies and resubmit the deliverable, plan,
8 report or other item for approval. Notwithstanding the notice of
9 disapproval, Respondent shall proceed, at the direction of EPA,
10 to take any action required by any non-deficient portion of the
11 submission.

12 6. If any submission is not approved by EPA, Respondent
13 shall be deemed to be in violation of this Order.

14 7. The Work performed by the Respondent pursuant to this
15 Order shall, at a minimum, comply with the SOW and be consistent
16 with the ROD. If any conflict exists between the ROD and the
17 SOW, the ROD shall control.

18 C. No Warranty Regarding Work Plans

19 Neither the Work Plans nor any approvals, permits or other
20 permissions that may be granted by EPA related to this Order
21 constitute a warranty or representation of any kind by the United
22 States that the Work Plans will achieve the standards set forth
23 in the ROD and the SOW, and shall not foreclose the United States
24 from seeking performance of all terms and conditions of this
25 Order. Nothing in this Order shall be construed to relieve
26 Respondent of its obligations to achieve all standards set forth
27 in the ROD and in the SOW.

1 X. ENDANGERMENT AND EMERGENCY RESPONSE

2 A. In the event of any action or occurrence during the
3 performance of the Work which causes or threatens to cause a
4 release of a hazardous substance or which may present an
5 immediate threat to public health or welfare or the environment,
6 Respondent shall immediately take all appropriate action to
7 prevent, abate, or minimize the threat, and shall immediately
8 notify the EPA Project Manager. If this person is not available,
9 Respondent shall notify the EPA Emergency Response Unit, Region
10 IX. Respondent shall take such action in consultation with EPA's
11 Project Manager, and in accordance with all applicable provisions
12 of this Order and all applicable deliverables submitted pursuant
13 to the SOW, including but not limited to the Health and Safety
14 Plans and the Contingency Plans. In the event that Respondent
15 fails to take appropriate response action as required by this
16 Section, and EPA takes that action instead, Respondent shall be
17 liable to the extent permitted by law.

18 B. Nothing in the preceding paragraph shall be deemed to
19 limit any authority of the United States to take, direct, or
20 order all appropriate action to protect human health and the
21 environment or to prevent, abate, or minimize an actual or
22 threatened release of solid wastes or hazardous wastes or
23 hazardous substances on, at, or from the Site.

24
25 XI. COMPLIANCE WITH APPLICABLE LAWS

26 A. All activities conducted by Respondent pursuant to this
27 Order shall be performed in accordance with the requirements of
28

1 all Federal and state laws and regulations. EPA has determined
2 that the activities contemplated by this Order are consistent
3 with the National Contingency Plan (NCP) if performed in full
4 compliance with the ROD, this Order, and the plans and schedules
5 approved hereunder.

6 B. Except as provided in Section 121(e) of CERCLA and the
7 NCP, no permit shall be required for any activities conducted
8 entirely on-Site; however, Respondent shall comply with all
9 applicable or relevant and appropriate requirements set forth in
10 the ROD. Where any activities require a Federal or state permit
11 or approval, Respondent shall submit timely applications and take
12 all other actions necessary to obtain and to comply with all such
13 permits or approvals.

14 C. This Order is not, and shall not be construed to be, a
15 permit issued pursuant to any Federal or state statute or
16 regulation.

17 18 XII. PROJECT MANAGER

19 A. All communications, whether written or oral, from
20 Respondent to EPA shall be directed to EPA's Project Manager.
21 Respondent shall submit to EPA three (3) copies of all
22 deliverables, documents, including plans, reports, and other
23 correspondence, which are developed pursuant to this Order, and
24 shall send these documents by overnight mail to EPA's Project
25 Manager unless directed otherwise.

1
2 EPA's Project Manager is:

3 Andria Benner
4 United States Environmental Protection Agency
5 75 Hawthorne Street, H-7-2
6 San Francisco, California 94105
7 (415) 744-2361

8 B. EPA has the unreviewable right to change its Project
9 Manager. If EPA changes its Project Manager, EPA will inform
10 Respondent in writing of the name, address, and telephone number
11 of the new Project Manager.

12 C. EPA's Project Manager shall have the authority lawfully
13 vested in Remedial Project Managers and On-Scene Coordinators by
14 the National Contingency Plan, 40 C.F.R. Part 300. EPA's Project
15 Manager shall have authority, consistent with the National
16 Contingency Plan, to halt any work required by this Order, and to
17 take any necessary response action.

18
19
20
21
22
23
24
25
26
27
28

XIII. SITE ACCESS AND DATA/DOCUMENT AVAILABILITY

A. Respondent shall provide access to its property to EPA
and EPA's authorized representatives and contractors for the
purpose of carrying out the requirements of this Order.

B. To the extent that the Site or other areas where Work is
to be performed is owned or controlled by parties other than
those bound by this Order, and to the extent that access to or
easements over property is required for the proper and complete
performance of this Order, the Respondent shall obtain access
agreements from the present owners or those persons who have
control over the property, including lessees, within sixty (60)

1 days of the effective date of this Order. Site access agreements
2 shall provide access to EPA, its contractors and representatives,
3 and to Respondent and its Contractor(s) and authorized
4 representatives, and such agreements shall specify that
5 Respondent is not EPA's representative with respect to liability
6 associated with Site activities.

7 C. In the event that site access agreements are not ob-
8 tained within the sixty (60) day period, Respondent shall notify
9 EPA within sixty five (65) days of the effective date of this
10 Order regarding both the lack of, and efforts to obtain, such
11 agreements. If Respondent fails to gain access within the sixty
12 (60) days, it shall continue to use best efforts to obtain access
13 until access is granted. For purposes of this paragraph, "best
14 efforts" includes, but is not limited to, seeking judicial assis-
15 tance and the payment of money as consideration for access.

16 D. Respondent or any of its agents or representatives shall
17 allow EPA and its authorized representatives and contractors to
18 enter and freely move about all property at the Site and off-Site
19 areas subject to or affected by the Work under this Order or
20 where documents required to be prepared or maintained by this
21 Order are located, for the purposes of inspecting conditions,
22 activities, the results of activities, records, operating logs,
23 and contracts related to the Site or Respondent and its
24 representatives or contractors pursuant to this Order; reviewing
25 the progress of the Respondent in carrying out the terms of this
26 Order; conducting tests as EPA or its authorized representatives
27 or contractors deem necessary; using a camera, sound recording
28

1 device or other documentary type equipment; and verifying the
2 data submitted to EPA by Respondent. Respondent shall allow EPA
3 and its authorized representatives and contractors to enter the
4 Site, to inspect and copy all records, files, photographs,
5 documents, sampling and monitoring data, and other writings
6 related to Work undertaken in carrying out this Order. Nothing
7 herein shall be interpreted as limiting or affecting EPA's right
8 of entry or inspection authority under Federal law.

9 E. Respondent may assert a claim of business confidentiality
10 covering part or all of the information submitted to EPA pursuant
11 to the terms of this Order under 40 C.F.R. § 2.203, provided such
12 claim is not inconsistent with Section 104(e)(7) of CERCLA, 42
13 U.S.C. § 9604(e)(7) or other provisions of law. This claim shall
14 be asserted in the manner described by 40 C.F.R. § 2.203(b) and
15 substantiated by Respondent at the time the claim is made.
16 Information determined to be confidential by EPA will be given
17 the protection specified in 40 C.F.R. Part 2. If no such claim
18 accompanies the information when it is submitted to EPA, it may
19 be made available to the public by EPA or the State without
20 further notice to the Respondent. Respondent shall not assert
21 confidentiality claims with respect to any data related to Site
22 conditions, sampling, monitoring or any other information
23 addressed by Section 104(e)(7).

24 F. Respondent shall maintain for the period during which
25 this Order is in effect, an index of documents that Respondent
26 claims contain confidential business information. The index
27 shall contain, for each document, the date, author, addressee,
28

1 and subject of the document. Upon written request from EPA,
2 Respondent shall submit a copy of the index to EPA.

3 G. Any person obtaining access to the Site pursuant to this
4 provision shall comply with all applicable provisions of the
5 Worker Health and Safety Plans as submitted pursuant to the SOW.

6 H. Notwithstanding any provision of this Order, the United
7 States retains all of its access authorities and rights under
8 CERCLA, RCRA and any other applicable federal statute or
9 authority.

10 I. Respondent shall provide to EPA upon request, copies of
11 all documents and information within its possession and/or
12 control or that of its contractors or agents relating to
13 activities at the Site or to the implementation of this Order,
14 including but not limited to trucking logs, receipts, reports,
15 correspondence, or other documents or information related to the
16 Work. Respondent shall also make available to EPA for purposes
17 of investigation, information gathering, or testimony, its
18 employees, agents, or representatives with knowledge of relevant
19 facts concerning the performance of the Work.

20 21 XIV. RECORD PRESERVATION

22 Until ten (10) years after EPA provides notice to Respondent
23 that the Work has been completed, Respondent shall preserve and
24 retain all records and documents in its possession or control,
25 including the documents in the possession or control of their
26 contractors and agents on and after the effective date of this
27 Order, that relate in any manner to the Site. At the conclusion
28

1 of this document retention period, Respondent shall notify the
2 United States at least sixty (60) days prior to the destruction
3 of any such records or documents, and upon request by the United
4 States, Respondent shall deliver any such records or documents to
5 EPA.

6
7 XV. DELAY IN PERFORMANCE

8 A. Any delay in performance of this Order that, in EPA's
9 judgment, is not properly justified by Respondent under the terms
10 of this Section shall be considered a violation of this Order.
11 Any delay in performance of this Order shall not affect
12 Respondent's obligations to fully perform all obligations under
13 the terms and conditions of this Order.

14 B. Respondent shall notify EPA of any delay or anticipated
15 delay in performing any requirement of this Order. Such
16 notification shall be made by telephone to EPA's Project Manager
17 within forty eight (48) hours after Respondent first knew or
18 should have known that a delay might occur. Respondent shall
19 adopt all reasonable measures to avoid or minimize any such
20 delay. Within five (5) days after notifying EPA by telephone,
21 Respondent shall provide written notification fully describing
22 the nature of the delay, any justification for delay, any reason
23 why Respondent should not be held strictly accountable for
24 failing to comply with any relevant requirements of this Order,
25 the measures planned and taken to minimize the delay, and a
26 schedule for implementing the measures to mitigate the effect of
27 the delay. An increase in cost or expense associated with
28

1 implementation of the activities called for in this Order is not
2 a justification for any delay in performance.

3
4 XVI. ASSURANCE OF ABILITY TO COMPLETE WORK

5 A. Respondent shall demonstrate its ability to complete
6 the Work required by this Order and to pay all claims that arise
7 from the performance of the Work by obtaining and presenting to
8 EPA within ninety (90) days after the effective date of this
9 Order, one of the following: (1) a performance bond; (2) a letter
10 of credit; (3) a guarantee by a third party; or (4) internal
11 financial information to allow EPA to determine that Respondent
12 has sufficient assets available to perform the Work. Respondent
13 shall demonstrate financial assurance to complete work costing
14 not less than \$300,000 per year. If Respondent presents internal
15 financial information and EPA determines that such financial
16 information is inadequate, Respondent shall, within thirty (30)
17 days after receipt of EPA's notice of determination, obtain and
18 present to EPA for approval one of the other three forms of
19 financial assurance listed above.

20 B. At least seven (7) days prior to commencing any work at
21 the Site pursuant to this Order, Respondent shall submit to EPA
22 a certification that Respondent or its contractors and
23 subcontractors have adequate insurance coverage or have
24 indemnification for liabilities for injuries or damages to
25 persons or property which may result from the activities to be
26 conducted by or on behalf of Respondent pursuant to this Order.
27 Respondent shall ensure that such insurance or indemnification is
28

1 maintained for the duration of performance of the Work required
2 by this Order.

3
4 XVII. UNITED STATES NOT LIABLE

5 A. The United States, by issuance of this Order, assumes no
6 liability for any injuries or damages to persons or property
7 resulting from acts or omissions by Respondent, or its directors,
8 officers, employees, agents, representatives, successors,
9 assigns, contractors, or consultants in carrying out any action
10 or activity pursuant to this Order. Neither EPA nor the United
11 States may be deemed to be a party to any contract entered into
12 by Respondent or its directors, officers, employees, agents,
13 successors, assigns, contractors, or consultants in carrying out
14 any action or activity pursuant to this Order.

15 B. Notwithstanding any approvals which may be granted by
16 the United States or other governmental entities, Respondent
17 shall assume any and all liability arising from or relating to
18 its contractors, subcontractors, or any other person acting on
19 its behalf in the performance of the Work or their failure to
20 perform fully or complete the Work.

21 C. Respondent shall save and hold harmless the United
22 States and its officials, agents, employees, contractors,
23 subcontractors, or representatives for or from any and all claims
24 or causes of action or other costs incurred by the United States,
25 including but not limited to attorneys fees and other expenses of
26 litigation and settlement, arising from or on account of acts or
27 omissions of Respondent, their officers, directors, employees,
28

1 agents, contractors, subcontractors, and any persons acting on
2 its behalf or under its control, in carrying out activities
3 pursuant to this Order, including any claims arising from any
4 designation of Respondent as EPA's authorized representative
5 under section 104(e) of CERCLA.

6
7 XVIII. ENFORCEMENT AND RESERVATIONS

8 A. EPA reserves any and all rights it may have to seek from
9 Respondent, under Section 107 of CERCLA, 42 U.S.C. § 9607, or
10 under any other applicable law, recovery of any response costs
11 incurred by the United States related to this Order. This
12 reservation shall include but not be limited to past costs,
13 direct costs, indirect costs, the costs of oversight, the costs
14 of compiling the cost documentation to support a demand for
15 oversight costs, as well as accrued interest as provided in
16 Section 107(a) of CERCLA.

17 B. Notwithstanding any other provision of this Order, at any
18 time during the response action, EPA may perform its own studies,
19 complete the response action (or any portion of the response
20 action) as provided in CERCLA and the NCP, and seek reimbursement
21 from Respondent for its costs, or seek any other appropriate
22 relief.

23 C. Nothing in this Order shall preclude EPA from taking any
24 additional enforcement actions, including modification of this
25 Order or issuance of additional Orders, and/or additional
26 remedial or removal actions as EPA may deem necessary, or from
27 requiring Respondent in the future to perform additional ac-

1 | tivities pursuant to CERCLA, 42 U.S.C. § 9606(a), et seq., or any
2 | other applicable law. Respondents shall be liable under CERCLA
3 | Section 107(a), 42 U.S.C. § 9607(a), and any other applicable
4 | law, for the costs of any such additional actions.

5 | D. Notwithstanding any provision of this Order, the United
6 | States hereby retains all of its information gathering, inspec-
7 | tion and enforcement authorities and rights under CERCLA, RCRA
8 | and any other applicable statutes or regulations.

9 | E. Respondent shall be subject to civil penalties under
10 | Section 106(b) of CERCLA, 42 U.S.C. § 9606(b), of not more than
11 | \$25,000 for each day in which it willfully violates, or fails or
12 | refuses to comply with this Order without sufficient cause. In
13 | addition, failure to properly provide response action under this
14 | Order, or any portion hereof, without sufficient cause, may
15 | result in liability under Section 107(c)(3) of CERCLA, 42 U.S.C.
16 | § 9607(c)(3), for punitive damages in an amount at least equal
17 | to, and not more than three times, the amount of any costs
18 | incurred by the Fund as a result of such failure to take proper
19 | action. Section 7003(b) of RCRA, 42 U.S.C. § 6973(b), provides
20 | that any person that willfully violates or refuses to comply with
21 | an order issued pursuant to Section 7003(a) may be fined not more
22 | than \$5,000 for each day in which such violation occurs or such
23 | failure to comply continues.

24 | F. Nothing in this Order shall constitute or be construed as
25 | a release from any claim, cause of action or demand in law or
26 | equity against any person for any liability it may have arising
27 | out of or relating in any way to the Site.

1 G. If a court issues an order that invalidates any provision
2 of this Order or finds that Respondent has sufficient cause not
3 to comply with one or more provisions of this Order, Respondent
4 shall remain bound to comply with all provisions of this Order
5 not invalidated by the court's order.
6

7 XIX. EFFECTIVE DATE AND COMPUTATION OF TIME

8 This Order shall be effective five (5) days after the Order
9 is signed by the Director, Hazardous Waste Management Division.
10 This fifth day after signature shall also be the "Effective Date"
11 for purposes of calculating performance times when the Order
12 specifies a period tied to the "Effective Date."
13

14 XX. OPPORTUNITY TO CONFER

15 A. Respondent may, no later than January 6, 1995, request a
16 conference with the EPA Project Manager to discuss this Order.
17 If requested, the conference shall occur no later than January
18 20, 1995, on a date approved by EPA, unless EPA approves a later
19 date. The conference shall take place at EPA's offices at 75
20 Hawthorne Street, San Francisco, California, unless another
21 location is approved by EPA.

22 B. The purpose and scope of the conference shall be limited
23 to issues involving the implementation of the response actions
24 required by this Order. This conference is not an evidentiary
25 hearing, and does not constitute a proceeding to challenge this
26 Order. It does not give Respondent a right to seek review of
27 this Order, and no official stenographic record of the conference
28

1 will be made. At any conference held pursuant to Respondent's
2 request, Respondent may appear in person or by an attorney or
3 other representative.

4 Requests for a conference must be by telephone to Andria Benner,
5 (415) 744-2361, followed by written confirmation mailed that day
6 to Andria Benner, Apache Powder Project Manager, United States
7 Environmental Protection Agency, H-7-2, 75 Hawthorne Street, San
8 Francisco, California 94105.

9
10 SO ORDERED, this 21 day of December, 1994.

11
12 BY: 

13 Jeffrey Zelikson
14 Director, Hazardous Waste Management Division
15 U.S. Environmental Protection Agency
16 Region IX
17
18
19
20
21
22
23
24
25
26
27
28